

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: Chapter 11
Owens Corning. et al.,
Debtor(s). Bankruptcy #00-03837 (JKF)

Wilmington, DE
February 25, 2002
4:00 p.m.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY JUDGE

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SUPP. APP. 003793

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SUPP. APP. 003796

1 (Proceeding in progress)

2 MR. PERNICK: Okay. Moving back to the agenda, I
3 think I'd like to take everything in order except Mr. Eckstein
4 and I had spoken about exclusivity and since it's related to
5 the Intercreditor Report I think -- and that's basically their
6 objection ties into that Intercreditor status and what the
7 Court might do on that, I think we'll take those together, but
8 we'll probably will ask the Court if we can have that
9 Intercreditor Status Report in discussion, and then move after
10 that to exclusivity at the end of that --

11 THE COURT: That's okay.

12 MR. PERNICK: -- just 'cause it seemed to make sense.
13 I don't know if Mr. Eckstein agrees with that particular
14 order, but he can -- maybe when we get to the Intercreditor
15 we'll deal with all that.

16 Starting with Agenda Item #1 was the Motion of the IRS
17 for Relief from the Automatic Stay to Exercise its Set-up
18 Rights, and on consent of the parties, we have adjourned that
19 until April 22nd at 1:00. And we understand that's in
20 Pittsburgh on April 22nd.

21 THE COURT: Yes. Are you coming to Pittsburgh? I
22 will be in Pittsburgh.

23 MR. PERNICK: I think it depends on what ends up
24 being on, but if there are pretty substantive matters on, I
25 think we probably will. If we think it's going to be a quick

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1 hearing, I think we probably won't.

2 THE COURT: All right.

3 MR. PERNICK: Moving to Agenda Item #2, and I don't
4 know if you want to, if you've had a chance to review Items 2
5 through, I think it's 7 or 8 --

6 THE COURT: Yes.

7 MR. PERNICK: It's 7. If you want me to go through
8 those --

9 THE COURT: I am waiting for the orders to be
10 entered. I have not signed those orders yet. The agenda
11 binder that I was presented with did not have the motions or
12 the orders in. So they may be here somewhere, but I don't
13 physically have them.

14 MR. PERNICK: I have duplicates with me, actually.
15 I'll be happy to --

16 THE COURT: You signed them? You stamped them for
17 me?

18 (The Judge confers with the clerk)

19 THE COURT: I've talked to Rachel, but I haven't seen
20 the order appearing in that hotel. So okay.

21 MR. PERNICK: All right. So that's Item -- just so
22 I've read the Courtroom notes, if they don't have an agenda in
23 front of them, that's Item #2, which is the Environmental
24 Settlement with the State of Ohio. Item #3, which is the
25 Motion for Leave to File Proof of Claim Out of Time, by

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SUPP. APP. 003798

1 Crossroads Distribution; Item #4, Authorizing the
2 Discontinuance of the Y2K Insurance Litigation; Item #5, which
3 is the Modification of the Automatic Stay to Effectuate a Set-
4 off between Specialty Products and Insulation Co., and the
5 Debtor; #6 is Exterior Systems' Motion to Enter into an Asset
6 Purchase Agreement. That's regarding Morin -- M-O-R-I-N. And
7 #7 is Exterior's Motion to Assume and Assign an Equipment
8 Lease Agreement with American Equipment Leasing.

9 That takes us up to Item #8, which you've got a
10 Certificate of No Objection on, but all of the parties have
11 not -- they had signed off, but had not actually signed the
12 final CMO, and I have that with me today.

13 THE COURT: All right. That's fine, I'll take it.

14 MR. PERNICK: And I have an original and an extra
15 copy, if I can.

16 THE COURT: All right.

17 MR. PERNICK: I guess I should have started out by
18 saying that we're pleased to actually to have a final CMO in
19 this case, and we view it as a form book that everybody in the
20 Courtroom should get. And anybody who can understand every
21 word in there should be elevated to some senior status. It is
22 quite a work of art.

23 (Laughter)

24 THE COURT: My question was, who's going to interpret
25 this, if there are any issues that arise?

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1 MR. PERNICK: Oh, the Debtors are. It'll be binding,
2 too.

3 (Laughter)

4 THE COURT: Do you want a copy of this back?

5 MR. PERNICK: Yes, please.

6 THE COURT: I take it there'll have been no changes -
7 - I should have asked that before I signed it -- from the
8 draft that I was presented except --

9 MR. PERNICK: Actually, that's -- thank you for
10 raising that. Attached to your copy I believe is a red line,
11 or if not, I have it here, that shows you the changes. The
12 only changes were -- when we filed it, we anticipated caps on
13 certain of those numbers, but we did not -- the financial
14 advisors had not completed meeting yet -- so we filed it with
15 no caps, with the understanding that we negotiate those and
16 put them in. And those are the changes that are in there now.

17 THE COURT: All right. And no one has an objection
18 to that?

19 MR. PERNICK: Not that I know of. I think everybody
20 has signed off, and everybody has signed the document.

21 THE COURT: All right. And that's the only change?

22 MR. PERNICK: There are several of them, but yes, but
23 that's the category of changes.

24 THE COURT: Okay, that's fine. That order is
25 entered.

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1 MR. PERNICK: Thank you.

2 THE COURT: On #9, I signed the modified order on #9
3 on February the 12th. I don't know where it is, I don't know
4 why it's not docketed, and I don't know why you don't have it,
5 but I did sign it. However, I did modify it.

6 MR. PERNICK: Okay.

7 THE COURT: So, I have a copy in Pittsburgh. I had
8 one faxed here Friday I think, but apparently it's missing, so
9 I will have another one faxed --

10 MR. PERNICK: Okay.

11 THE COURT: -- and hopefully, you will get it.

12 MR. PERNICK: Okay, yeah. If we can just - we'll
13 get that if you want us to copy it, and hand copies out, we'll
14 be happy to do that for the Court.

15 THE COURT: All right.

16 (Pause in proceedings)

17 MR. PERNICK: Now, the next matter is Baron & Budd's
18 Motion for Relief from Stay, and as we recall, the status of
19 that was that we were to attempt to reach a consensual order
20 on that, and if we couldn't, we were going to come to Court,
21 and Your Honor, I think, was either going to tell us that you
22 were reserving judgment, or you were going to issue your
23 ruling. So I'm not sure that there's more argument on that.
24 I don't know what people have to say about that, or whether
25 you want them to say anything, but that's the status of it as

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1 of now, and Mr. Podesta from the Debtor is here.

2 THE COURT: Okay. I thought from the consent letter
3 that you had resolved this, no?

4 MR. PERNICK: We did not resolve it, no. I
5 apologize.

6 THE COURT: Okay. Oh -- not in consent.

7 MR. PERNICK: Right.

8 THE COURT: I can't read, I apologize. I thought it
9 said the parties will be --

10 MR. PERNICK: No.

11 THE COURT: Okay.

12 MR. PERNICK: Unfortunately, that there are two
13 diametrically different views of where this should go, so it
14 was not resolved.

15 THE COURT: Okay. Mr. Podesta?

16 MR. PODESTA: Your Honor, I don't want to present any
17 argument, but as part of the parties' efforts to reach a
18 settlement, we did clarify somewhat the status of certain of
19 the Plaintiffs, and I thought it would be useful to put it on
20 the record in as neutral a manner as I can.

21 You'll recall that the principle amount of the Fiberboard
22 Escrow Account was \$44 million and the principle amount of the
23 OC Escrow Account was \$66 million as originally established.
24 Under the agreement, Baron & Budd was permitted to draw down
25 from the escrow account, with respect to those of their

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1 clients who received written approval from OC or Fiberboard,
2 if that particular client had met the requirements of the
3 agreement.

4 Prior to the petition date, Fiberboard issued approvals
5 with respect to 5,372 Plaintiffs, formal written approvals
6 under Part 12 of the Settlement Agreement. Prior to the
7 Petition, some \$15,700,000 was paid to those Plaintiffs. If
8 those 5,372 Fiberboard Plaintiffs were to receive their second
9 and third installments, those second and third installments
10 would completely consume, with a substantial amount left over
11 in potential further claims, the full amount of the 44
12 million.

13 THE COURT: I'm sorry. It would consume --

14 MR. PODESTA: Yes. The second and third installments
15 to those 5,372 Plaintiffs would consume the full amount of the
16 remaining principle of the escrow, so that in paying those
17 installments, the entire 44 million principle amount of the
18 escrow would be gone. The 28,200,000 or so that is now in
19 principle in the escrow would be consumed by those payments
20 alone.

21 With respect to Owens Corning, the situation is somewhat
22 different. Prior to the petition date, 3,511 Plaintiffs
23 received formal written approval under the agreement, and they
24 were paid pre-petition some 17,200,000 which would leave in
25 the escrow accounts, in principle, in rough round numbers,

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1 48,800,000. Completing the second and third installment
2 payments to those 3,511 individuals would involve the payment
3 of slightly over \$39 million more, such that there would be
4 approximately \$7,400,000 remaining in the escrow accounts, in
5 principle, for OC after those individuals were fully paid.

6 Now, there is one other category of claimants that I
7 think I should -- that I think Baron & Budd and we were able
8 to identify, and I would just set out the facts as to them to
9 the Court. These are individuals as to whom OC or Fiberboard
10 internally determined pre-petitioned, that they had met the
11 preconditions to payment under the agreement, but that they --
12 these individuals were not the recipients of formal notices of
13 approval per se, pursuant to Part 12 of the contract.

14 In the Fiberboard case, there were 946 Plaintiffs, and --
15 who if they were paid all their money would receive
16 \$11,210,000. Of course, the Fiberboard escrow, as I've
17 already pointed out, the principle amount would be consumed
18 simply by those who had already received their full -- have
19 received full, formal written approval under Part 12.

20 With respect to Owens Corning, where there is some seven
21 -- if you pay all those who receive the formal written
22 approval there would be some 7,400,000 left in principle
23 amount, there are 646 who received internal approval from OC,
24 but not formal written approval prior to the petition date.
25 And those 646, if they were paid in full their three

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1 installments, they would consume the remaining principle
2 amount of the OC account. And I pass those facts along
3 without argument.

4 THE COURT: Okay. Well, I don't know that I can do
5 much more to try to articulate my findings on the record. I
6 think I was pretty specific about what I would conclude. Does
7 anybody wish to address what I have already stated on record,
8 essentially with respect to these Plaintiffs who were
9 identified and received a distribution through the petition,
10 it seems to me that either through an assumption of the
11 contract, if this were deemed to be an executory contract, or
12 through whatever damage they're going to be able to prove,
13 since they have negotiated the settlement agreement and issued
14 a release, that there is fair consideration for the payment,
15 they're entitled to the payment, and they should be paid. Now
16 the Debtor has an issue as to whether that payment should be
17 made now or at planned confirmation. Quite frankly, I'm not
18 sure why we need to hold that up 'til planned confirmation,
19 when I think it's pretty clear that they're entitled to be
20 paid. On that issue, I'm somewhat less adamant, I suppose,
21 and can be probably swayed your way, but it seems to me that
22 those Plaintiffs will have allowed claims in the amount of the
23 settlement. There is consideration, I do not think there are
24 fraudulent conveyances involved to the extent that releases
25 have been issued. I don't see any defense to the payment, and

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1 I think they need to be paid.

2 With respect to the category that was just identified by
3 Mr. Podesta, Plaintiffs who may have internally asked to the
4 two Debtors that identify as entitled to receive payments, but
5 who were not notified in writing that the settlements would be
6 approved, it seems to me that as to those, they are not in any
7 better a position, because no formal releases have been
8 executed by those parties than any other Plaintiff in the
9 case. And as a result, they are not entitled to payment at
10 this time. If they choose to go forward with their settlement
11 proposals, I suppose their claims can be limited to that
12 amount, if the debtor decides at some point through the plan
13 to assume those settlement agreements as executory contracts.
14 To the extent the Debtor does not decide to do that, and
15 therefore pay the amounts that would be due at least at
16 planned confirmation, they have the entitlement to file their
17 full claims in full, because there is not an approved
18 settlement of those claims.

19 So one way or the other, I think there's an issue out
20 there to be adjudicated with respect to them, and I think the
21 Debtor gets the first bite at attempting to decide what to do
22 with them. With respect to everybody else, as to whom the
23 administrative process has not yet gotten to the point where
24 the Debtors even have requests to consider whether the
25 settlements were approved, there is no such (in quotes),

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SUPP. APP. 003806

1 "executory contract," to be approved, there was no settlement
2 offer, and they're not entitled to payment at this time. And
3 those funds, to the extent there are any left over, have to be
4 rebated back to this estate. Those are, as much as I can, I
5 guess, succinctly put on record today.

6 MR. PODESTA: Your Honor, two points of
7 clarification. First, I don't believe the Debtors are taking
8 the position that the distribution to these Plaintiffs has to
9 await planned confirmation. We had argued early on that no
10 distributions to these Plaintiffs of the third installment
11 could be made until January 17, 2002, when it was
12 contractually due, but that date has now passed. And
13 secondly, I just want to clarify that when I say that the
14 Debtors had determined internally that these -- this other
15 group had met the requirements to the agreement, that included
16 the delivery of releases.

17 THE COURT: Oh, so they've already delivered
18 releases --

19 MR. PODESTA: They --

20 THE COURT: -- and didn't get a distribution.

21 MR. PODESTA: they -- that's right. They have
22 delivered releases, they've met the medical requirements,
23 they've met product I.D. requirements, but they've not
24 received the formal written notice of approval from the
25 Debtors to Baron & Budd, saying you can release the money

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1 under the agreement. Rather, it's just, if you look at the
2 Debtor's internal records, they have check marks that these
3 people had met the requirements for medical product I.D. and
4 releases.

5 THE COURT: Well, I think the problem with that is,
6 that I'm not inclined at this point to say that the Fiberboard
7 entities are different from the Owens Corning entities in that
8 respect. In the event there's no money to pay the Fiberboard,
9 I think the Owens people are probably going to have to wait as
10 well.

11 To the extent that releases have been delivered though, I
12 still think the law in the Circuit's pretty clear, that any
13 transfer in connection with that is not going to be deemed to
14 be a fraudulent conveyance, i.e., it would have been made with
15 their consideration, given the parameters of -- the fact that
16 the release is a contractually bargained for exchange. But I
17 think, on balance, that there was no distribution, and the
18 Debtors still have right to those funds. Until a distribution
19 was made, the debtor still has rights to those funds, and they
20 have to be rebated back to the estate. I don't see another
21 way at this point in time, given the law under which I think
22 we work, to get around that proposition.

23 So, I think the answer is that the Plaintiffs identified
24 who received a partial distribution who are now entitled to
25 distributions two and three, and who executed releases and

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SUPP. APP. 003808

1 otherwise got the formal consent of the Debtor, should be
2 paid. All others should not. And any funds in excess of the
3 payments to the class who is entitled to be paid should be
4 rebated back to this estate.

5 MR. PODESTA: Your Honor, do you want us to submit
6 an order to that?

7 THE COURT: I think that would be helpful, but does
8 anyone want to be heard on this matter further? I'll give you
9 literally two minutes. Mr. Esserman?

10 MR. HARRIS: Your Honor --

11 THE COURT: Oh, yes, sir.

12 MR. HARRIS: Sorry, Your Honor, this Gordon Harris
13 from Davis, Polk & Wardwell, representing the Unsecured
14 Creditors Committee. I appreciate the opportunity to
15 participate via telephone. We understand Your Honor's ruling
16 and legal argument and won't bother the Court anymore with
17 that, although I say, with all respect, that we do disagree,
18 and I believe that it's highly probable that the Committee
19 will want to appeal.

20 In terms of, I believe Mr. Podesta in the Court was just
21 mentioning a possible order. Certain things Mr. Podesta put
22 on the record, and I believe I understood most of them, I
23 would point out though, that terms of exactly, for lack of a
24 better phrase, I would say, who gets what, pursuant to Your
25 Honor's ruling is somewhat unclear. I think we all know that

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1 somewhere between, you know, 40 and 45% of this goes out in
2 terms of contingent fees and the like to lawyers, and exactly
3 who else gets -- each of the individuals who gets how much,
4 and what records are kept, there is really nothing in terms
5 this record and the like, so that the Court and indeed and the
6 parties have knowledge of who is purported to get what. So I
7 was merely going to suggest in the terms of the order that
8 Your Honor take that measure and perhaps require some
9 specificity.

10 THE COURT: All right, yes. I think it's appropriate
11 to identify the particular Plaintiffs who get a distribution
12 and the amount of that distribution.

13 MR. HARRIS: In addition, Your Honor, I infer from
14 the comment you made earlier about findings, whether a payment
15 would be now or later, and inferring from your further comment
16 that you see no great reason to wait until the end of the
17 case, if I am correct, and if the Committee from this do take
18 an appeal, it would be appropriate to appeal now and not have
19 to wait until they do the final calculations, etcetera, for
20 each person. I just raise that as an issue. Perhaps we can
21 get it out of the way.

22 THE COURT: Okay. It seems to me that with respect
23 to -- well, let's see, I was going to say an allowance of
24 claims, but this is not an allowance of claims proceeding,
25 although I think it's sort of turned into one because in order

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732-329-0191

SUPP. APP. 003810

1 to authorize Baron & Budd to either repay funds sufficient to
2 pay these claims, or else to make a distribution, essentially,
3 I'm allowing these claims in the amount of the settlement.
4 So, maybe the thing to do is simply an order that allows the
5 claims in the amount of settlement and then directs the
6 payment. Is that what you're asking?

7 MR. HARRIS: Well, I was thinking about one, you
8 know, proceeding was an appeal if the identification was going
9 to take a long time for individuals.

10 THE COURT: Oh, well the order won't be entered
11 until I get the list that identifies the individuals and
12 states what there's to be -- what amounts they're to get. So,
13 there won't be an order actually entered on record and
14 appealable until I get it from counsel to the Debtor, and I
15 won't get it until they have the list.

16 MR. HARRIS: Okay, Your Honor. I just wanted to
17 understand these proceedings. Quite honestly, I -- we may be
18 able to expedite this. I don't know if there -- if it makes
19 any sense to -- in the appeals process now, I don't think it's
20 going to change much. The issues on appeal with respect to
21 which GOC individuals are identified --

22 THE COURT: Well, it may not, but it seems to me that
23 that would provide them with some appropriate notice in any
24 event of the fact that their claims were going to be
25 essentially allowed, and that's the end. Because they've

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SUPP. APP. 003811

1 executed releases, they have no further claims against this
2 estate. So I think it would be appropriate to send that out
3 by way of notice to those parties anyway.

4 MR. PODESTA: Your Honor --

5 THE COURT: Mr. Podesta?

6 MR. PODESTA: I don't believe it will take us very
7 long to come up with a list of individuals who meet the
8 description of Your Honor's order. These are the individuals
9 who we already paid, and I think we've reached agreement with
10 one or two -- a handful of exceptions of the individuals who
11 have received payment. So it should not take much longer than
12 the time it would take to draft up and reach an agreement on
13 the order to be submitted.

14 THE COURT: Okay. If the Creditors' Committee --
15 well, you may have a number of disagreements, but is your
16 primary dispute with my legal analysis, or is your primary
17 dispute with the payment now, or as opposed to your own plan?

18 MR. HARRIS: I think it's both, Your Honor. We
19 believe, and this is based on a comment that -- especially at
20 the prior hearing, that the individuals who received the first
21 payment have -- yes, they have claims against the estate, they
22 have no particular claims to these funds. They should be paid
23 like any Creditor with a fixed contract claim out of these
24 funds through the Debtor's funds. And separately, aid should
25 be -- aid at the end of the case, the way every other contract

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1 creditor is paying, and should abide by the plan.

2 THE COURT: I'm sorry, you faded out. And should
3 what?

4 MR. HARRIS: Should abide by the confirmation of the
5 plan.

6 THE COURT: Oh, okay. Well, as I said earlier, with
7 respect to when the payment's made, that's part of it,
8 frankly, I'm not so wedded to. In terms of the fact that they
9 should be paid from this fund, though, for the reasons that
10 I've attempted to articulate several times in the past, and
11 don't want to go into again today necessarily, I think they
12 are entitled to a payment from this fund. So to that extent,
13 that the funds are available to these Creditors, it seems to
14 me that there really isn't much of an issue about their
15 entitlement to be paid from them, for the reasons I've already
16 gone into, but as to when the distribution takes place, I
17 think that's a little more difficult decision.

18 MR. HARRIS: Fine, then maybe we will just wait until
19 we see Mr. Podesta and Baron & Budd's Form of order. And
20 perhaps we can, if the Court wanted to enter an interim order
21 and we'll address the timing of payment later.

22 THE COURT: Yeah, that may make sense, because I
23 still am hoping that you folks will come to some agreement
24 with respect to this. So when you take a look at the order,
25 I'll give you sufficient time to circulate it around and see

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732-329-0191

1 if you're able to come up with something that you can all live
2 with.

3 MR. HARRIS: Thank you, Your Honor.

4 THE COURT: Okay. Mr. Emrich?

5 MR. EMRICH: Your Honor, just two quick points, one
6 is a clarification. I don't believe Mr. Podesta in his
7 remarks alluded to the investment proceeds, but that's also as
8 I understand it, in the account and consistent with Your
9 Honor's prior findings, it is my understanding that those
10 would revert to the estate.

11 THE COURT: They should come back to the estate, yes.

12 MR. EMRICH: {Cough} excuse me. Your Honor, we share
13 Mr. Harris's concerns. We strenuously believe that these
14 payments shouldn't be made in advance of a plan. These
15 claimants do have claims. The Code recognizes that whether
16 these Creditors are secured, unsecured, or otherwise, they get
17 paid under a plan.

18 And I would point Your Honor to the A.H Robbins 4th
19 Circuit Decision that 832 F.2d 299, 4th Circuit, 1987, where
20 the 4th Circuit overturned a Bankruptcy Court order which had
21 set aside funds in a mass tort context to set up an emergency
22 treatment fund for claimants. And it was predicated solely on
23 the basis, Your Honor, that payments to Creditors ought to be
24 under a plan, and that is what the Code envisions, and there
25 are only a limited set of exceptions to that, and this

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132-329-0191

1 circumstance does not fit in to the necessity of payment
2 doctrine, Your Honor. There is nothing compelling the Debtors
3 to make these payments now.

4 THE COURT: Yeah, Mr. Emrich, that's what I tried to
5 say. I'm really not so wedded to the concept of when this
6 disbursement has to be. I think the legal issue simply is,
7 are they entitled to be paid from this specific fund as
8 opposed to a general Debtor account, a general Debtor fund.
9 And for the reasons I've gone into, I think they do have a
10 claim to the specific fund that has been identified as to
11 them, because once those Plaintiffs have been identified, and
12 they have, pursuant to their first distribution, under Texas
13 law, I think as to those entities, there is actually an escrow
14 that they then have a right to claim against. As to the
15 entities that have not received that fund and have not been
16 identified, I don't think the same interpretation of the law
17 applies.

18 So I'm not, as I said earlier, I'm not so married to when
19 the distribution has to be. I think it's a bit inconsistent
20 to say that these are escrowed funds for the benefit of these
21 Plaintiffs, and then also say that they have to wait plan
22 distribution, because to the extent that they're escrowed
23 funds for their benefit, I'm not sure it's property of the
24 estate. But I don't know that we need to get there, so --

25 MR. EMRICH: I don't want to open the whole argument

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732-329-0191

SUPP. APP. 003815

1 up again, Your Honor, but the point I'd made at the first
2 argument very simply was that even if these were Secured
3 Creditors, which they're not, that the Code envisions that
4 Secured Creditors would be paid under a plan.

5 THE COURT: Well, but yeah, but the Code also
6 envisions though that there are adequate protection remedies
7 for other Secured Creditors, and to the extent that there is a
8 rate which is identified specifically for a group of
9 beneficiaries, under 541, I think there is an issue as to
10 whether those proceeds are property of the estate that would
11 be subject to distribution to any of the Debtor's other
12 Creditors anyway. But, as I said, Mr. Emrich, I'm really not
13 sure it's worth getting into the issue. Holding the
14 disbursement off 'til the end of the case isn't going to cause
15 them any more prejudice, than it's going to cause any other
16 asbestos Plaintiff in the case.

17 MR. EMRICH: Thank you, Your Honor.

18 THE COURT: Mr. Esserman?

19 MR. ESSERMAN: Your Honor, I'd first like to address
20 -- I'm sorry, for the record, Sandy Esserman of Stutzman and
21 Bromberg. I'd first like to address that the timing of the
22 disbursement. It seems to me that if the Plaintiffs have
23 rights in these funds, there's no need to hold up the
24 distribution. I think that legal and equitable title has
25 merged in those Plaintiffs that have complied with Your

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732-829-0191

SUPP. APP. 003816

1 Honor's ruling, and at that point, there is questionable
2 authority in my mind as to whether or not it's estate property
3 at all, and whether or not it should be held up to the end of
4 the case. It seems to me an obvious answer, and that answer
5 is no.

6 I do want to address Your Honor's prior rulings on the
7 investment income. Mr. Emrich raised that issue, and I
8 assume, pursuant to Your Honor's ruling you're overruling all
9 of my arguments on the investment interest being a property of
10 the Trust or property to which the Plaintiffs would be
11 entitled through escrow or trust or under either theory, and I
12 enunciated some of those at the last hearing.

13 I will not enunciate those again for Your Honor, but
14 there was an additional argument. I just wanted to make sure
15 the record was clear that, as Your Honor recalls, there are
16 three steps of payment: a zero, zero, two thousand, year 2000
17 payment; a January 2001 payment; and a January 2002 payment.
18 To the extent the plaintiffs should have been paid their
19 qualified pre-petition and were not paid on those dates,
20 interest income has accrued in those escrow or trust accounts,
21 and there is a question as to if they should have been paid on
22 01, and if they should have been paid on 02, whose interest
23 would that be? I just wanted to make sure that I understood
24 Your Honor's ruling clearly that any interest that accrued on
25 those funds would have to be returned to the Debtor, versus

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732-329-0191

1 property of those Plaintiffs that have been qualified and
2 didn't get their --

3 THE COURT: I think the issue is whether they are
4 still treated as Unsecured Creditors, and to the extent that
5 they're still Unsecured Creditors, they're not entitled to
6 interest on their claims. So I don't see why interest on
7 those claims is attributable to those Plaintiffs. I think
8 they are entitled to a disbursement of their settlement amount
9 in full, but I don't see a theory under which interest would
10 be attributable to an Unsecured Claimant.

11 MR. ESSERMAN: That's fine, Your Honor. I just
12 wanted to make sure that I understood your ruling correctly.
13 The other issue on the disbursement immediately versus a
14 delayed disbursement, obviously there's going to be interest
15 that accrues on this rather substantial amount of money from
16 say, today forward, and to the extent the Plaintiffs were not
17 to receive their money, the interest that accrued on that
18 money that they should have received pursuant to Your Court's
19 order it would seem to me would clearly be property of those
20 Plaintiffs. But nevertheless, I did want to raise those
21 issues also.

22 THE COURT: Well, yeah, that's the troublesome part
23 of the distribution issue, Mr. Esserman, because if it isn't
24 property of the estate, I mean if this ruling stands for the
25 proposition that now it's known that it's not property of the

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732-329-0191

SUPP. APP. 003818

1 estate, yes, I'm going forward. I think the interest on the
2 funds that would be disbursed to those Plaintiffs would be
3 their interest, because it's their money. To the extent,
4 however, that it's still property of the Estate, but subject
5 to a limited distribution, that is, only particular asbestos
6 Plaintiffs have a claim to this specific fund, even though the
7 property is still property of the Estate, that interest would
8 be attributed to the Estate, not to those Plaintiffs.

9 So it really comes down to a question of whose property
10 it is, and that's what I said. I don't think this motion
11 compels me to make a determination. I'm not really prepared
12 to make that determination. It just seems to me that these
13 Plaintiffs are entitled to a disbursement from this fund.
14 Based on the way the contract is written, and the fact that
15 the Debtor essentially has the rights to ordinary interest in
16 these accounts, and I understand the argument that the Debtor
17 then has to apply that reversionary interest in specific ways,
18 but nonetheless, the reversionary interest is that of the
19 Debtor.

20 It seems to me that until the funds are distributed,
21 they're still property of the Estate. It's just that I don't
22 think that the Debtor can do anything under these settlement
23 agreements with those funds of Plaintiffs who've met the
24 qualifications, as I've described on this record, except
25 disbursed money matter. So, on balance, I think it's probably

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732-329-0191

SUPP. APP. 003819

1 still going to be interest that belongs to the Estate, not to
2 the Debtors -- I'm sorry, not to the Plaintiffs in the case.

3 MR. ESSERMAN: Okay.

4 THE COURT: But, that's sort of a gut reaction.

5 MR. ESSERMAN: Thank you. The only other thing I'd
6 like to address is something Mr. Emrich said about the A.H.
7 Robbins Case. I think that was completely inapposite, and I
8 don't believe that that particular fund was set up pre-
9 petition with a particular class of Plaintiffs in mind who had
10 given releases pre-petition, and had been approved for payment
11 pre-petition. I think that situation was totally inapposite.

12 THE COURT: I don't really see much similarity in the
13 situation of Robbins either Mr. Esserman. My ruling is not
14 based on what happened in Robbins. My ruling is based on my
15 view of the construction of this contract, and what I think
16 the applicable law is with respect to property of the estate
17 and fair consideration paid in exchange for a settlement
18 agreement coupled with a release.

19 MR. ESSERMAN: Your Honor, we will try and pout
20 together an order for your consideration.

21 THE COURT: Okay.

22 MR. ESSERMAN: Thank you.

23 THE COURT: All right. I know this one may take a
24 while because you're going to have to circulate it to people,
25 but when can I expect this? Two weeks, three weeks?

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732-329-0191

1 MR. PERNICK: I think we certainly want to see the
2 transcript, and I don't know how long that's going to take,
3 but certainly we would want to see the transcript in order to
4 track Your Honor's ruling as accurately as possible.

5 THE COURT: Okay. Six weeks?

6 (Laughter)

7 MR. ESSERMAN: When's the next omnibus hearing?

8 MR. PERNICK: Two weeks, I think.

9 THE COURT: The next omnibus is March the 18th.

10 MR. PERNICK: Now it's March 18th, I can actually
11 answer that --

12 THE COURT: Okay.

13 MR. PERNICK: -- question.

14 (Laughter)

15 MR. PERNICK: The date that Your Honor has open is
16 March 25th, at 9:30 for two hours in Pittsburgh, which I think
17 works. We may need to shorten the timeframes that Your Honor
18 talked about earlier on when things will be due, and when
19 objections will be due, because if you back up from the 25th,
20 you don't make it, but it's close.

21 THE COURT: Yeah, that's fine.

22 MR. PERNICK: Okay, so we'll just fix separate orders
23 for that -- separate dates for that hearing in the order.

24 THE COURT: So are we not doing hearings in Owens on
25 March 18th?

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732-329-0191

SUPP. APP. 003821

1 MR. PERNICK: Correct.

2 THE COURT: We do them all on March 25th.

3 MR. PERNICK: Unless anybody has a major problem with
4 that, that's what we would suggest. We just move March 18th
5 to March 25th at 9:30 in Pittsburgh and, you know, we'll see
6 whether we need it or not.

7 THE COURT: Okay. You may not have your transcripts
8 and drafts circulated that soon, though. That's fine --

9 MR. PERNICK: May not.

10 THE COURT: -- but I don't know how long it's going
11 to take. I would think that the transcript of the prior
12 proceedings would be of more value than this one.

13 MR. ESSERMAN: And we've got that transcript of the
14 prior proceeding.

15 THE COURT: You do?

16 MR. ESSERMAN: Yes, Your Honor, at least I've got it.
17 I'll be happy to share it with anyone who would like a copy.

18 (Laughter)

19 MR. PERNICK: Why don't we take --

20 MR. ESSERMAN: I'll send you a copy, Your Honor.

21 MR. PERNICK: Why don't we take a shot at that
22 Order, and if we can get it in by the next hearing, and if we
23 can't, we'll let the Court know where we are, because we'll
24 have to order the other transcript.

25 THE COURT: All right. Why don't I do this? I'll say

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732-329-0191

1 that the order is to be entered when brought to Court in
2 Pittsburgh, if it's ready by then, and if not, the parties
3 will tell me a day.

4 MR. PERNICK: Now I have one other question on this
5 Form of Order, Your Honor. The ruling that Your Honor just
6 made obviously has implications for other escrow accounts that
7 the Debtor has. We may as well just deal with that straight
8 up, and I've thought about this a little bit, although I may
9 not have the right thoughts. Obviously the parties to those
10 escrow agreements are not in Court, so I don't think that
11 order, just being entered can be binding on them. However, I
12 do think that the rulings that you made will probably mean
13 that, you know, it gives you an answer on those other escrows.

14 I have two suggested ways to handle that. One is to
15 draft the order with those other escrows in mind, and
16 contemplate it and cover by it, and put it out on notice to
17 those parties for them to have it chance to come in and object
18 to it, and put their reasons in. The second would be for us
19 to file some kind of Declaratory Judgment Action, based on
20 that order with respect to the other escrows, to determine
21 what their status is, and the status of those monies. There
22 may be a third way, I don't know.

23 THE COURT: Well, are the escrow agreements all
24 alike?

25 MR. PERNICK: No.

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732-329-0191

1 MR. ESSERMAN: They're completely -- Your Honor,
2 Sandy Esserman, for the record, excuse me. They're completely
3 different types of agreements, I believe, between the various
4 parties, and I would strenuously object to any other escrow
5 agreements coming into play within this Order. I think we've
6 teed it up specifically for the Baron & Budd Agreement by
7 motion. The parties have responded specifically to the Baron
8 & Budd Motion. There are other issues which are not present
9 in the other settlement agreements, or agreements, between the
10 parties that are not present in the Baron & Budd Motion, and I
11 think it would be unfair to Baron & Budd to try and tie that
12 into those other agreements into this process.

13 THE COURT: Why I don't think that is a part of what
14 is applied to them. I think what is wanted to do is to say
15 this is how the Judge ruled in this case, so --

16 MR. PERNICK: This case does apply.

17 MR. ESSERMAN: I have no problem with him talking the
18 order and this motion and showing the other parties what Your
19 Honor has ruled and said, "here's the law," and that's fine.

20 THE COURT: At least until some other Judge changes
21 it, okay?

22 MR. ESSERMAN: That's fine, but on the other hand, I
23 don't want the entry of this order to be in any way dependant
24 on any other party, other than those in the Courtroom today.

25 MR. PODESTA: Well, why don't we do this? why don't

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732-329-0191

SUPP. APP. 003824

1 we --

2 MR. HARRIS: Your Honor, Gordon Harris of Unsecured
3 Creditor's Committee. The issue that we agree with Mr.
4 Esserman on. Based on the limited facts we know, the
5 agreements are different, underlying factual circumstances are
6 different. We would strenuously urge the Debtor to do, is
7 commence competing against the others for whatever
8 determination the Debtors want, and we will then will make a
9 determination whether or not -- THE COURT: All right, Mr.
10 Harris, I'm sorry, you're fading out. Let me see and make
11 sure I can restate what you said. Do you agree with Mr.
12 Esserman that these agreements are different and the facts
13 underlying them are different. You'd like the Debtor to start
14 subpleading against the others, and then --

15 MR. HARRIS: You are correct Your Honor, and we
16 believe that they -- the proceedings will be different and we
17 will want to participate in those. I agree with Mr. Esserman
18 that this order should not address those other agreements.

19 THE COURT: All right.

20 MR. PERNICK: I was just looking for a mechanism, but
21 I think that's a good suggestion. We'll modify it a little
22 bit. When we get this order, we're going to go to the other
23 parties first, and make a demand for what we want, and if they
24 don't accede to that demand, then we'll bring whatever
25 appropriate action we need to --

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732-929-0191

1 THE COURT: Okay, that's fine.
2 MR. PERNICK: -- rather than just suing.
3 THE COURT: All right.
4 MR. PERNICK: They may see the light when they see
5 the order.
6 THE COURT: Okay.
7 MR. ESSERMAN: Thank you, Your Honor. We will see
8 you in Pittsburgh -- a common phrase speaking these days.
9 (Laughter)
10 MR. PERNICK: Your Honor, the next Motion is #11,
11 which is the continuation of Plant Insulation's Motion for An
12 Order Appointing An Examiner On Fiberboard.
13 MR. ESSERMAN: Your Honor, may I be excused --
14 THE COURT: Yeah.
15 MR. ESSERMAN: -- from further proceedings?
16 THE COURT: Yeah. Anyone who is not interested in
17 the rest of the agenda is free to leave. Is this Plant
18 Insulation Motion going forward today?
19 MR. PERNICK: I think as far as Plant's concerned it
20 is, Your Honor.
21 THE COURT: Okay.
22 MR. PERNICK: I do believe that there was a
23 subcommittee set up among the Creditors to deal and
24 investigate the Plant issues, and I think that Miss Parver has
25 a report that she'd like to make to Your Honor, and a proposal

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732-329-0191

1 for what to do, but I think that Plant would like it to go
2 forward.

3 THE COURT: Okay. Then, if we're going to go forward
4 on this issue, may I ask my legal questions first, and then
5 I'll be happy to address any issues. This Motion for the
6 appointment of the examiner is under 1104(c)(s) --

7 (Pause in proceedings)

8 THE COURT: -- which states, in essence, that if the
9 Court does not order the appointment of a Trustee under this
10 section, that being section 1104, section 1104(a) says: "at
11 any time after the commencement of the case, but before
12 confirmation of a plan, on a request of a Party-In-Interest of
13 the United States Trustee, and after notice and hearing, the
14 Court shall order the appointment of the Trustee,"etc. Have I
15 ever received a Motion to appoint a Trustee?

16 MR. PERNICK: You have not received a Motion to
17 appoint a Trustee.

18 THE COURT: Well then, how do I have to appoint an
19 Examiner? I have never been asked to, nor denied the
20 appointment of a Trustee. So, even if the appointment of an
21 examiner is mandatory under (c)(2), if I don't appoint one
22 under (a), I've never been asked to appoint one under (a).
23 So, I think the issue is not framed appropriately. I don't
24 think the release can be granted, and I think the motion has
25 to be dismissed without prejudice. Anybody here for Plant who

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752-929-0191

SUPP. APP. 003827

1 wants to convince me that I'm in error? Okay, then --

2 MR. TRAVIS: We're not sure.

3 (Laughter)

4 THE COURT: If I have an order that I cannot -- Mr.
5 Pernick can you submit me an order?

6 MR. PERNICK: Yeah, I think there is somebody here
7 from Plant who wants to address the Court.

8 THE COURT: Oh, I'm sorry, I apologize. Yes?

9 MS. MALONEY: Good afternoon, Your Honor. Mary
10 Maloney Huss for Plant, and I'd to introduce my Co-counsel,
11 Monte Travis of Travis and Pon. He has already been admitted
12 pro hoc, Your Honor.

13 THE COURT: All right, thank you.

14 MR. TRAVIS: Thank you, Your Honor. Yes, on behalf
15 of Plant Insulation, Your Honor, the reason we've brought this
16 motion is because Owens Corning had the motive, and the
17 opportunity, and we believe there are indications that they
18 did improperly use Fiberboard settlement trust moneys to
19 settle Owens Corning asbestos liabilities. And there's no
20 one, at this point, who is either -- that has an incentive to
21 find this out, or who is unconflicted with respect to whether
22 they should find this out. And in fact, most of the people
23 seated in this Courtroom today have an incentive not to find
24 this out. Now, I am not aware of any case involving a Motion
25 to appoint an examiner in which the Court found that there was

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732-329-0191

SUPP. APP. 003828

1 a pre-condition in 1104,
2 that --

3 THE COURT: Well, I ruled that way in an unpublished
4 decision in another case and I think, being consistent with
5 myself, I still that's the correct reading.

6 MR. TRAVIS: All right, while then you're one case
7 ahead of me, Your Honor.

8 (Laughter)

9 THE COURT: It's nice to be consistent with yourself,
10 occasionally.

11 (Laughter)

12 MR. TRAVIS: On the other hand, it's also nice
13 sometimes to change one's mind, when it appears to be the
14 right thing to do.

15 (Laughter)

16 THE COURT: It is.

17 MR. TRAVIS: And the examiner provisions of section
18 1104, of course, were a result of compromise which took out
19 trustee provisions that previously had been part of the
20 bankruptcy law. And again, I haven't read Your Honor's
21 unpublished decision. I also haven't seen any other
22 decisions, published or otherwise, or any suggestion in the
23 commentary to the effect that there must be an application
24 first, a Motion for Trustee --

25 THE COURT: Well, I know. But how else do you read

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732-329-0191

1 the rule? I mean, if you look at the Code, the Code
2 specifically says -- and, you know, the argument has been
3 raised by Plant that the language of the statute is clear on
4 its face, it needs essentially no hearing. Well, I agree. I
5 think it is clear on its face, and it says if the Court does
6 not order the appointment of the trustee under this section,
7 which is section 1104, and the only section to provide
8 appointment of the trustee -- well, actually either 11(a) or
9 11(b) -- but they both require motions, and I have no such
10 motion. Therefore, I don't have to appoint an examiner, and I
11 don't see a ground to appoint an examiner on a mandatory
12 basis, because I have never refused to appoint a trustee, nor
13 has anybody yet presented me with information to show cause of
14 why a trustee should be appointed.

15 MR. TRAVIS: Your Honor, in that respect, again, I
16 would look at the plain language of the statute. If the Court
17 does not order the appointment of a trustee under this
18 section, the Court has not --

19 THE COURT: That's right.

20 MR. TRAVIS: -- ordered the appointment of a trustee
21 under this section.

22 THE COURT: I've never been asked to.

23 MR. TRAVIS: And --

24 THE COURT: So I've never refused it.

25 MR. TRAVIS: -- I don't believe that Section C

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732-329-0191

SUPP. APP. 003830

1 requires, on its face, that there be a prior application or a
2 refusal, merely that it hasn't happened. Because an examiner
3 of course has a different burden, I mean a different task,
4 different role, and it's intended to be something that's far
5 less intrusive than a trustee.

6 THE COURT: Oh sure. I think you could read the
7 statute to say that in lieu of a trustee that an examiner in
8 some circumstances might be appropriate, as opposed to a
9 trustee. But it seems to me that the only time it's mandatory
10 is if I haven't entered the appointment of a trustee, and I've
11 never been presented with that motion.

12 MR. TRAVIS: So --

13 THE COURT: I've never had a chance to either refuse
14 or not refuse.

15 MR. TRAVIS: All right. Well, I recognize that I'm
16 swimming hopelessly upstream on this one, Your Honor.
17 Procedurally then, Plant still has an interest that it
18 believes is not being protected, and it is a very large
19 interest as far as Plant is concerned. What Your Honor then
20 would require in order to get to the point where we would be
21 able to bring a motion for an examiner is a prior motion for a
22 trustee.

23 THE COURT: No, I'm sorry. I think you may have the
24 grounds to file a request for an examiner for some other
25 cause. I think the issue is whether I must, whether I am

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732-329-0191

SUPP. APP. 003831

1 compelled, to appoint an examiner on your motion because there
2 is no trustee in the case. And I do not think that the law
3 requires me to do that when I have never been presented with a
4 request to appoint a trustee in a case, and have never looked
5 at the issue of whether a trustee, or a trustee with limited
6 powers, or an examiner in lieu of a trustee, is appropriate in
7 a case. So, you may have grounds to request an examiner. The
8 issue is, am I mandatorily required to appoint one? And I
9 think the answer is, under the circumstances facing me here,
10 I'm not.

11 MR. TRAVIS: All right. And if instead, we now move
12 for the appointment of a trustee in conjunction with an
13 alternative motion for an examiner, would that then present
14 the situation for the Court properly, as the Court reads that
15 statute?

16 THE COURT: Well, your grounds for appointment of the
17 trustee have to be pretty intense.

18 MR. TRAVIS: Right. But if we lost that, is that the
19 foundational -- is that the foundation that Your Honor's --

20 THE COURT: That's the foundation that is required
21 for me to have a mandatory requirement to appoint a trustee.
22 Now, I recognize the fallacy in this reasoning, because if I
23 deny the appointment of the trustee, it's probably because I
24 don't think you have grounds to appoint a trustee, and
25 therefore, then I'm back into this examiner if you ask for

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732-329-0191

SUPP. APP. 003832

1 that relief as an alternative. But, you know, it may very
2 well be at that point that there is some mandatory reasoning.
3 I don't think the statute is as clear as Plant believes it to
4 be for the reasons I'm explaining now. But, yes, that would
5 be my understanding of the foundational underpinning.

6 MR. TRAVIS: All right. Thank you, Your Honor.

7 THE COURT: So, I think at this point, this motion is
8 either -- on a mandatory grounds, should be denied without
9 prejudice. If you have some other grounds that you want to
10 articulate on a non-mandatory discretionary basis, then I
11 think you always have the right to make that request.

12 MR. TRAVIS: All right. Well, so far our motion has
13 been couched in terms of the mandatory grounds, and we have
14 not placed it in terms of the discretionary. So, we will take
15 another look at it, Your Honor, because this is something we
16 feel very strongly has not been yet protected by the
17 constellation of parties currently before the Court.

18 THE COURT: Okay. Has Plant taken advantage of the
19 opportunity I provided to get into the intercreditor issues?

20 MR. TRAVIS: Well, this is very interesting, because
21 I saw in the status report from, I believe it was from the
22 Debtors, saying well, Plant never called, Plant had the
23 opportunity, we set up a subcommittee on December 21st, and so
24 on. I think they have our phone number. I think they could
25 have called us and said, "Hey, we're having a big meeting

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Certified Court Transcribers

732-329-0191

1 about your motion, do you want to come?" And nobody did. And
2 we would be happy to take advantage of that. However, the
3 intercreditor issues -- although a lot of the documents, I
4 understand, are being developed as part of that -- may be
5 relevant to what we think an examiner needs to do, and
6 therefore could make the appointment of an examiner both
7 cheaper and easier; that is, make the examiner's job cheaper
8 and easier.

9 It really arises from different concerns, concerns that
10 the banks had about guarantees given them by subsidiaries who
11 supposedly are not subject to asbestos claims and bondholder
12 claims, and so on. It doesn't really respond to our concern
13 that Fiberboard's Selma Trust, in effect, was purchased by
14 Owens Corning so they could use that in their nationwide
15 settlement program, or any other settlement program they
16 pursued, to help defer Owens Corning's asbestos liabilities.
17 And we had requested the U.S. Trustee to appoint a separate
18 Creditor's Committee for Fiberboard, and the U.S. Trustee
19 didn't think that that was the right thing to do at that time,
20 and we've been active on this issue, and I guess we intend to
21 continue to be active, and we certainly will avail ourselves
22 of whatever opportunity is going to be presented to us to
23 participate with respect to that. And I was not aware of this
24 meeting in December.

25 THE COURT: All right. Well, Mr. Pernick, to the

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732-329-0191

SUPP. APP. 003834

1 extent that Plant would like to participate, please provide
2 notice of when the documents are available, so that --

3 MR. PERNICK: Your Honor --

4 THE COURT: -- they can look at the documents.

5 MR. PERNICK: -- that's never been a problem. Let's
6 be clear about what happened. When we were in Court, I don't
7 remember when it was, October or November on the original
8 motion, Plant understood what the process was. We said we
9 were going to get those documents together, and we offered
10 basically for them to participate. I think it's a nice
11 argument to say we should call them at every step of the way,
12 but frankly, I'm not going to beg them to come get information
13 to look into this claim.

14 We're very comfortable with the subcommittee which the
15 Debtor has stayed out of, except to supply information and
16 answer questions. We don't know what they're doing. We got a
17 little bit of a report that was a public -- a whole group
18 report last week about where they were. But we haven't been
19 participating in that, and if Plant has questions, all they
20 have to do is ask. So to push it back on us, and say, "You
21 know, should have asked us whether we had any questions,"
22 that's garbage. I mean, you know, I don't -- I'm sorry for
23 characterizing it that way, but it's a little disingenuous.

24 MR. TRAVIS: Well, I don't think we need to burden
25 the record with this discussion, Your Honor. I think we can

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Certified Court Transcribers

732-329-0191

SUPP. APP. 003835

1 probably talk about this and set the garbage aside,
2 prospectively.

3 MR. PERNICK: If they want information and document
4 statements, I think Miss Parver's going to give you a little
5 report on what they've done to date, and what they're doing.
6 All they have to do is contact her, and they can get whatever
7 they want.

8 THE COURT: Okay. Then, Plant is aware of the fact
9 at this point that you can contact Miss Parver and get
10 documents that you're interested in looking at with respect to
11 the transfer that you're alleging. I will enter an order that
12 denies this motion for appointment of an examiner without
13 prejudice, when it's submitted to me within a week by the
14 Debtor. Okay.

15 MR. TRAVIS: Thank you, Your Honor.

16 THE COURT: All right. Thank you. Miss Parver?

17 MS. PARVER: Yes, Your Honor. I guess I'm supposed
18 to give you a report.

19 (Laughter)

20 MS. PARVER: Your Honor, there has been a
21 subcommittee of the Futures representative and the Unsecured
22 Creditor's Committee to look into all of the allegations
23 raised by the Plant motion. Frankly, they're very relevant,
24 not only to the intercreditor, but as well to issues of the
25 Future representative, because we are the Future

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732-329-0191

SUPP. APP. 003836

1 representative for Future claimants rising from any Fiberboard
2 asbestos liability as well.

3 In that regard, Your Honor, we have interviewed the
4 lawyers from the Debevoise, Plimpton firm who negotiated many
5 of the NSP agreements, going into the basis on how they were
6 negotiated, etc. We have asked for and received voluminous
7 documents as well as the Debtor's analysis of how they would -
8 - the allegations of Plant. We've interviewed the leading
9 lawyer from the Brobeck, who was with the Brobeck firm, who
10 represented Fiberboard pre-acquisition by Owens Corning, and
11 subsequent to the acquisition by Owens Corning negotiated many
12 of the NSP agreements for Fiberboard with respect to the same
13 allegations from Plant. We have further interviews to be
14 conducted with respect to the interim trustee and the present
15 trustee of the Fiberboard Trust. We're still awaiting a lot
16 of documents, and we have additional requests for information
17 in terms of disbursements and the financial accounting for the
18 trust.

19 And in addition, Your Honor, we have been speaking, both
20 the Unsecured Creditor's Committee and we as well, with our
21 asbestos claims experts, Your Honor, because in many respects,
22 the process that they will be going through in terms of
23 arriving at estimations of asbestos claims will be looking at
24 the settlement histories, the tort histories, of both of these
25 companies, and as a matter of timing, they'll be looking at it

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732-329-0191

SUPP. APP. 003837

1 from pre-acquisition of Fiberboard imposed acquisition, so
2 they can do subsequent analyses, Your Honor, which will also
3 give the Court, if you will, a mathematical or a very
4 objective estimate or calculation with respect to how
5 liability was apportioned.

6 THE COURT: All right. Is there any reason why Plant
7 has raised this issue and is concerned with the outcome that,
8 especially in lieu of looking at an examiner motion or a
9 trustee motion again, Plant can't benefit from the work that's
10 been done?

11 MS. PARVER: Your Honor, I don't see why they -- I
12 assume there are -- they will be entering into the same kind
13 of confidentiality agreements and orders.

14 THE COURT: Yes, they'd have to have a
15 confidentiality agreement.

16 MS. PARVER: And right now, obviously our
17 communications with our own experts and the Unsecured's
18 communications with theirs are still separate. But apart from
19 that, Your Honor, I don't see myself, a problem with making a
20 lot of this information available in relevant documents, and
21 they should contact me.

22 THE COURT: Okay. Plant's counsel so hears. Mr.
23 Travis, you heard. Okay.

24 MR. TRAVIS: I heard, thank you, Your Honor.

25 THE COURT: All right. Anything else by way a status

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732-329-0191

SUPP. APP. 003838

1 report with respect to that portion of the Intercreditor
2 Agreement? Do we want to get into the rest of that issue now,
3 or later?

4 MR. PERNICK: I think if I can, there's a few more
5 things that we can get through quickly, and we'll --

6 THE COURT: All right.

7 MR. PERNICK: -- give the Intercreditor. The next
8 one would be #13, which is the Debtor's 7th motion for an
9 order under 365(a) authorizing the Debtors to reject
10 miscellaneous contracts and unexpired leases, and it's with
11 respect to the Caterpillar objection. And we've actually got
12 a Proposed Form of Order that's been agreed to by Caterpillar.
13 I think I -- let me see if I have a red line, I'm not sure.
14 Yes, I do. It just, it says, that "provided, however, that
15 the leases and contracts with Caterpillar shall be deemed
16 rejected as of the date the Debtor surrenders possession of
17 the equipment subject to the Caterpillar leases, the Debtors
18 and Caterpillar shall provide one another all reasonable
19 cooperation, so that the Caterpillar equipment is surrendered
20 to Caterpillar as soon as reasonably possible."

21 On Paragraph #3, on the rejection, on the date for claims
22 subject to the rejection, "Caterpillar has 30 days from the
23 date the Debtors surrender," obviously because that date's
24 going to be later than today, "the Caterpillar equipment to
25 file their claim, and the Court retains jurisdiction to hear

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732-329-0191

SUPP. APP. 003839

1 and determine any disputes arising under the order."

2 THE COURT: Okay. With respect to those agenda items
3 12 and 13, I -- yes, I have a problem with this. I'm going to
4 enter these orders this time because you've resolved it. But
5 I really do expect the parties to stick to no extensions
6 beyond the calendar week before my hearings, because I cannot
7 get ready for them. I will enter these orders today. I will
8 not do it again. They will be automatically pushed over to
9 the next agenda.

10 MR. PERNICK: Okay.

11 THE COURT: Okay, anybody here for Caterpillar who
12 wishes to be heard? All right, I'll take your order Mr.
13 Pernick, if you --

14 MR. PERNICK: Okay.

15 (Pause in the proceedings)

16 MR. PERNICK: Item #14, Your Honor, and I apologize
17 for it getting resolved late this time, but it was actually a
18 lot more complicated, and obviously going forward, we will
19 adhere to the one-week ahead. But this was the Debtor's
20 motion pursuant to sections 105, 363 for authority to transfer
21 pursuant to an Asset Purchase Agreement of Shielding Solution
22 Assets, and there were three objections: MGM Consumer
23 Products, Credit Suisse-First Boston, and Andrew Woodside.
24 And all three of those objections have been resolved. I've
25 actually got to bench file the Notice of Withdrawal from Mr.

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732-329-0191

SUPP. APP. 003840

1 Woodside, because he's pro se, and obviously when we were
2 resolved it, we told him he didn't need to come out. We did
3 tell him he could be available by phone with the Court if he
4 wanted to, and I think he chose not to do that, but --

5 THE COURT: Okay.

6 MR. PERNICK: -- I have his original signed
7 withdrawal for the Court.

8 THE COURT: All right. Thank you.

9 MR. PERNICK: And I have a blacklined, if I can
10 approach, I'll give you the duplicate and the original order
11 and then a blacklined order, and then if you want, I can walk
12 you through what those changes were.

13 THE COURT: All right. Just one second, please.

14 (Pause in the proceedings)

15 THE COURT: Okay.

16 MR. PERNICK: Did I give you a blacklined copy, Your
17 Honor?

18 THE COURT: No, you didn't.

19 MR. PERNICK: Let me do that, because it would be
20 easier for you to follow.

21 THE COURT: Can I just read it quickly?

22 MR. PERNICK: Sure.

23 THE COURT: It might take less time to read the
24 order.

25 MR. PERNICK: Sure. If you look in paragraphs three

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732-329-0191

SUPP. APP. 003841

1 and four while you're reading it, those are the major changes.

2 THE COURT: All right. Have the parties seen this?

3 MR. PERNICK: Yes. I just passed around another copy
4 so everybody could see it and make sure, but we did circulate
5 it before the hearing.

6 (Pause in the proceedings)

7 THE COURT: Anyone wish to be heard on the changes in
8 this order?

9 MR. BOUGHTON: Your Honor, good afternoon, Bill
10 Boughton for MGM. I just wanted to alert Your Honor that the
11 changes to the Form of Order resolve MGM's limited objection.
12 We're happy to have it withdrawn. Thank you.

13 THE COURT: Okay, thank you. Good afternoon.

14 MR. ECKSTEIN: Your Honor, Kenneth Eckstein, Kramer,
15 Levin, on behalf of CSFB as agent for the banks. Your Honor,
16 we had raised several issues, I think connected with this
17 motion. We had raised similar issues in connection with
18 prior motions. We're satisfied that the purposes of this
19 motion paragraph three, preserves the banks' rights, and I
20 think is adequate for purposes of entering the order.

21 THE COURT: Okay. Okay. That order is signed.

22 MR. PERNICK: If I could trouble the Court for the
23 duplicate original of that, because --

24 THE COURT: Here.

25 MR. PERNICK: -- I think the purchaser's in the

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732-329-0191

SUPP. APP. 003842

1 Courtroom.

2 (Pause in proceedings)

3 THE COURT: Okay.

4 MR. PERNICK: The next one is #15, which is the
5 hearing on the Debtor's request for preliminary injunction.
6 You might recall that there is a standstill agreement that was
7 entered into, but Standard Chartered Bank Societe Generale and
8 KBC Bank were not part of that. They had a separate
9 agreement. And as to them, the TRO, I believe, expires
10 tomorrow. So this is a stipulation in order with us and those
11 banks. Further extending the TRO, it runs through April 22nd
12 at 5:00 p.m.

13 The reason for that, Your Honor, is simple. There are
14 negotiations going on to resolve those claims. They mostly
15 deal with loans or related to loans with non-filing foreign
16 joint-ventures that Debtor is in, and there work-outs to be
17 done in each of those joint ventures, and they're complicated.
18 But they have been proceeding, and there are discussions that
19 continue, so those banks have agreed to continue with the TRO
20 while those discussions take place.

21 THE COURT: All right. Do you have an order?

22 MR. PERNICK: Yes.

23 (Pause in proceedings)

24 THE COURT: Here you are, Mr. Pernick.

25 MR. PERNICK: Thank you. That leaves us with 16,

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732-329-0191

SUPP. APP. 003843

1 which is the intercreditor status report; 12, which is the
2 exclusivity motion, and then one quick one, which I can get
3 out of the way, #17, which was the status report on the fee
4 examiner. As you probably recall, the Court asked us to look
5 into that and make a proposal. We did get actually a very
6 excellent suggestion from Mr. Esserman. A gentleman, Warren
7 Smith, who has been the fee examiner on a number of Delaware
8 cases, and he sent me a proposal, and I anticipate that we'll
9 provide the Court with a proposal either to retain him or some
10 other party before the next hearing.

11 THE COURT: Okay.

12 MR. PERNICK: But I did send that around to everybody
13 in the Courtroom. I haven't received any objections to him
14 yet, and I'll just make sure that we're okay with the
15 arrangement. We have to talk to him about the fee, because in
16 some of the other cases, he's gotten a percentage --

17 (Laughter)

18 MR. PERNICK: -- of the gross fees reviewed, and in
19 this case, I guess the good news for him is that it's a large
20 set of fees each year. I don't think we want to go that high,
21 so we're going to talk to him about it. It'll probably be
22 some kind of sliding scale that makes it a more reasonable
23 number.

24 THE COURT: Okay. He has recently been appointed as
25 the fee examiner in the Grace Case as well. And I guess,

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732-329-0191

SUPP. APP. 003844

1 since I don't use fee examiners very often, I didn't make what
2 use of him I thought my be appropriate clear in Grace.

3 MR. PERNICK: Right.

4 THE COURT: And he was asking whether he could talk
5 to me about that. I thought it might be better if he came to
6 Court, and we all resolved that issue. So, in the Grace Case,
7 I was about ready to enter an administrative order that writes
8 things into the same types of categories that we're using in
9 this case, because it makes my own review much easier. Mr.
10 Smith apparently doesn't think that's necessary from his point
11 of view. In fact, it may make things more complicated, rather
12 than less. I think you need to raise this issue with him,
13 Mr.Pernick --

14 MR. PERNICK: Okay.

15 THE COURT: -- to see what's going to work best. I
16 do not want to increase fees simply to review fees.

17 MR. PERNICK: Right.

18 THE COURT: That isn't the point. It's just that
19 it's getting very difficult to get through all these fee apps
20 in all these big cases, and I simply need help.

21 MR. PERNICK: Sure.

22 THE COURT: If he wants to come to Court and raise
23 whatever issues so we all can work it out, I'm happy to do
24 that, but I really do not prefer to have a private discussion
25 --

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792-329-0191

SUPP. APP. 003845

1 MR. PERNICK: Okay.

2 THE COURT: -- along those lines.

3 MR. PERNICK: Okay. I will talk to him about that.

4 THE COURT: Okay.

5 MR. PERNICK: And we'll come to the Court with a
6 proposal either from him or from somebody else.

7 THE COURT: All right.

8 MR. PERNICK: All right. I'm going to turn it over
9 now to Mr. Monk for the status report on the intercreditor.

10 THE COURT: Good afternoon.

11 MR. MONK: Good afternoon, Your Honor. Charles Monk
12 from Saul, Ewing in behalf of the Debtors. Your Honor,
13 obviously, we submitted a written status report in advance and
14 I apologize. I know that the Court has lots to do, and I
15 realize that it arrived very late, and I won't repeat the
16 matters in the written status report, because I'm certain the
17 Court has read it and given it some thought. Let me do a
18 review, and then I'll be happy to answer any questions the
19 Court may have, and I'll make a recommendation from the
20 Debtors.

21 The overview is that we have been proceeding with
22 additional information production. We've had -- our schedule
23 has worked out so we've had about one meeting a month, usually
24 in advance of the omnibus hearing, in which we can sort of
25 report on the status of information requests that have been

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732-329-0191

SUPP. APP. 003846

1 made in the preceding period. The parties are basically down
2 to letter requests and then the Debtor or other parties
3 responding to those letter requests. And that process seems
4 to be working, I think, well by all accounts.

5 At our last meeting, we had some very frank and, as you
6 can see from the list of issues, pretty substantive discussion
7 about issues that the parties were beginning to glean from
8 their factual review. We think that that discussion -- these
9 meetings last anywhere from two and a half to three hours.
10 Much longer than that, I think, sort of gets into diminishing
11 returns. So that's sort of been the timeframe that I've been
12 operating on, as, if you will, the major dumbo of this
13 process. I think the process is working quite well, and I'd
14 like to see it continue.

15 We have some work to do with third party sources of
16 information, although we've actually made some progress on
17 that front. We've been informed by the underwriters that they
18 will turn their documents over for us to review, and we're --
19 we still have to work out how we get copies of those
20 documents, but I can also report that in an order entered on
21 Friday of last week, the Court in Boston set a hearing date of
22 March the -- I think the 13th -- but in that week in March --
23 for a possible hearing on the Motion to Dismiss, which was the
24 one basis that the underwriters and the parties in that case
25 were asking us to hold off on production there.

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732-329-0191

SUPP. APP. 003847

1 I'm sure there are other issues that the parties will
2 bring forward. These are the ones that we have discussed so
3 far, and I don't mean to suggest that these are --that those
4 discussions are in any way complete. I was happy that we
5 could identify the issues and get agreement that those
6 subjects are generally the subjects that we think require
7 further investigation. The banks have come forward and made a
8 strong recommendation that we initiate a litigation posture,
9 and I -- in their statement, that I'm sure the Court has read,
10 they are encouraging the parties to think about this in terms
11 of proceeding with valuation hearings, or valuation litigation
12 procedures. It's interesting that they would have the Debtors
13 initiate that process, which I think is -- the Debtors are not
14 interested in doing in any way.

15 We think this negotiation posture is the way to go.
16 The parties have been -- frankly, at the very first meeting
17 there was a general agreement among the parties that these
18 discussions were for purposes of settlement, that the
19 discussions were therefore protected from further use, that
20 the parties could then have some assurance that they could be
21 candid in their discussions, as lawyers sit down and across
22 the table. We think if you put this in a litigation posture
23 at this point in time, the benefits of those discussions will
24 go out the window, issues will -- that it may be possible to
25 persuade a litigant might not be worthy of their pursuing,

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732-929-0191

SUPP. APP. 003848

1 might suddenly pop to the fore as, if we're going to fight
2 this in litigation, every issue that people have is going to
3 come up and be put on the table.

4 The Debtors believe that the next -- the way to move the
5 process along, the next affirmative thing we can do is to
6 present on a schedule, which we propose, factual stipulations
7 that try to clear away the underbrush of some of these issues
8 which are heavily ensconced in accounting facts. Let me give
9 you an example there. We have, for instance, the whole
10 question of the Owens Corning Fiberglass Technology License
11 Agreement, and the Court will remember -- I'll just do a
12 little background facts here -- that Owens Corning in 1991
13 entered into a contract with an new entity it created called
14 Owens Corning Fiberglass Technology, by which Owens Corning
15 transferred its domestic intellectual property then in its
16 possession to Owens Corning Fiberglass Technology, and
17 licensed that technology back from OCFT.

18 The reason for that is clearly because there were certain
19 tax strategies that Owens Corning could take advantage of that
20 would assist it in managing its state income tax liabilities.
21 I don't think there's any real -- very much debate about that
22 subject. That process involved paying royalties to OFCT, and
23 in return, OFCT immediately loaning that money back to Owens
24 Corning under a revolving credit agreement that was entered
25 into at the same time the licensing agreement was entered

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Certified Court Transcribers

732-929-0191

SUPP. APP. 003849

1 into. That agreement was pretty much in place -- there were a
2 few factual developments in connection with it -- but that's
3 basically the arrangement for the past 10 years, and it's a 20
4 year agreement.

5 When the Debtors first began to focus on this agreement,
6 and think about the implications of that agreement in
7 connection with this bankruptcy, we frankly brought it to the
8 attention of the banks and other Creditors. And we said, "you
9 know what we've learned about this arrangement we have with
10 OCFT? We think it has implications here. We think it is
11 going to require some fairly thorough factual development for
12 everyone to understand about these issues." We recognized at
13 the same time that there was an enormous possibility that the
14 parties could go spinning off on litigation involving these
15 issues, and it was our objective to avoid that litigation, to
16 get people talking, but at the same time understanding that
17 they needed a lot facts, so they would feel comfortable in
18 discussing those issues and reaching agreements regarding the
19 values that would be represented by the claims against OCFT,
20 and who had the rights to those claims.

21 There are other Debtor entities that face -- that have
22 similar issues associated with it, OCFT being the one that's
23 most prominent in our discussion, but certainly Integrex, and
24 Fiberboard, and IPM, which is the holding company for many of
25 Owens Corning's foreign entities, and was set up for similar

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732-329-0191

SUPP. APP. 003850

1 tax strategies -- this is another entity that will have a
2 significant amount of facts that need to be pulled together.
3 A lot of those issues are not -- I have taken accountants'
4 depositions before, Your Honor, and frankly, that -- they're
5 very -- not -- that's -- lawyers, you know, I think went to
6 law school because math wasn't their thing, and --

7 (Laughter)

8 THE COURT: I should advise you in the interest of
9 fair disclosure, that I'm married to a CPA Mr. Monk --

10 (Laughter)

11 MR. MONK: Well, Your Honor, what -- what I was going
12 to say --

13 THE COURT: -- so I perfectly well understand.

14 (Laughter)

15 MR. MONK: Well, I think it makes some sense to try
16 for the Debtor, if the Debtor takes the lead and uses the
17 majesty of the Debtor's responsibility here as the basis for
18 our actions, the Debtor takes the lead, and tries to pull
19 together a factual stipulation that would deal with the
20 accounting issues in some sort of rational way, rather than
21 spend lots and lots of time with lawyers interviewing
22 accountants and lots of conversations that don't seem to link
23 up. We think that advances the ball. We think that helps the
24 parties understand where their rights may be, and we think
25 that that will move the process forward.

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732-329-0191

SUPP. APP. 003851